RIGHTS STUFF

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Genetic Information Act Of 2008

In May, 2008, President George W. Bush signed the Genetic Information Nondiscrimination Act of 2008 (GINA) into law. According to a fact sheet published by the Equal Employment Opportunity Commission, GINA was enacted "in recognition of developments in the fields of genetics, the decoding of the human genome and advances in the field of genomic medicine. Genetic tests now exist that can inform individuals whether they may be at risk for developing a specific disease or disorder. But just as the number of genetic tests increase, so do the concerns of the general public about whether they may be at risk of losing access to health coverage or employment if insurers or employers have their genetic information."

Title II of GINA applies to private and governmental employers with 15 or more employees, employment agencies, labor unions and joint labor-management training programs. This title, which goes into effect on November 21, 2009, prohibits the use of genetic information in employment, prohibits the intentional acquisition of genetic information about applicants and employees (with some exceptions) and imposes strict confidentiality requirements on employers.

The law defines genetic information as including information about an individual's genetic tests, genetic tests of a family member and family medical history. It does not include information about the sex or age of an individual or the individual's family members or information that an individual currently has a disease or disorder. Nor does it include tests for alcohol or drug use.

There are some exceptions to the general rule against employers acquiring genetic information. One is called the water cooler exception, in which a supervisor inadvertently overhears a conversation between co-workers in which genetic information is discussed or receives genetic information in response to a question about the general health of an employee or an employee's family member. Another exception is when an employer receives genetic information as part of documentation an employee submits in support of a request for a reasonable accommodation for a disability under the Americans with Disabilities Act.

As noted, covered employers are required to keep any genetic information they have about applicants or employees confidential. If the employer has this information in writing, he should keep it separate from any other personnel records, locked up and accessible only to employees with a need to know that information. Information about genetic information that is not in writing should be kept confidential as well and shared only with those employees with a need to know that information.

The remedies available under GINA are the same as remedies available under Title VII of the Civil Rights Act, the federal fair employment law: reinstatement, hiring, promotion, back pay, injunctive relief, pecuniary and non-pecuniary damages, attorney's fees and costs.

The EEOC is still in the process of revising regulations to fully implement GINA. ♦

BHRC
PO BOX 100
Bloomington IN
47402
349-3429
human.rights@
bloomington.in.gov

Nose Rings And Religious Discrimination

Carla Santiago worked for a Subway sandwich shop in Florida as an assistant manager. She was told she had to remove her nose ring because it violated the restaurant's no facial-jewelry policy. She refused, citing religious reasons, and asked Subway to waive the policy in her case. The restaurant asked for documentation of her religious beliefs, and she provided a note from herself and from her mother explaining her religion. Subway denied her request, saying it was unaware of any religion that requires believers to wear a nose ring. Ms. Santiago was told she had five days to either provide bona fide documentation about her religious beliefs or to remove the nose ring. She didn't do either and was fired.

Ms. Santiago sued, claiming religious discrimination. To establish a prima facie case in a religious discrimination lawsuit, the plaintiff has to show that she had a bona fide religious belief that conflicted with an employment requirement, that she informed her employer about her belief and that she was discharged for failing to comply with the conflicting employment requirement.

Subway suggested that Ms. Santiago could wear a flesh-covered band-aid over her nose ring or she could leave the store when the franchise inspector was present so the restaurant would not be found in violation of the rules. She refused to cover up her nose ring, saying it would be "like abnegating [her] religion." The Court agreed with her that having to cover up a symbol of her religious belief was not a reasonable accommodation. Nor was the second suggested accommodation reasonable; it amounted to "encouraging subterfuge or fraud by the franchise in order to enable it to avoid being deemed out of compliance by the auditors."

Subway said that Ms. Santiago did not work with the restaurant to come up with accommodations. But the Court said she did not have to cooperate with discussions about covering up her nose ring or taking it off.

Subway also said that allowing her to wear the nose ring openly violated food safety standards. But given that they were willing to allow her to wear the nose ring but just leave the premises when the inspector came by, the Court found that argument to be weak. The Court's conclusion was supported by the fact that Subway allows employees to wear watches and wedding rings, which also are in violation of the food safety guidelines cited by the restaurant.

Subway's motion for summary judgment was denied and the case will continue. At trial, Ms. Santiago will have to show that her religious beliefs were bona fide. The case is US Equal Employment Opportunity Commission v. Papin Enterprises, Inc., 2009 WL 961108 (M.D. Fl. 2009). ♦

A Frightening Case Of Sexual Harassment

The U.S. Equal Employment Opportunity Commission issued a press release saying it was suing Willamette Tree Wholesale, an Oregon nursery, for allegations of serious sexual harassment.

Willamette operates a 140-acre nursery and garden supply store. According to the EEOC's investigation, a farm foreman repeatedly took a Latina employee to remote areas of the farm and raped her. He allegedly threatened her with termination, physically coerced her with pruning shears and made threats against her life as well as against her family.

When she refused to be sexually assaulted again, she was fired.

The EEOC said that another Latina employee faced daily sexual innuendos and propositions for sex as well as grabbing and touching. She and her husband, also an employee, reported the harassment to their supervisor. But Willamette failed to investigate the complaint. The EEOC said that the woman, her husband and her brother were all fired in retaliation for having reported and opposed the sexual harassment.

The acting chairman of the EEOC, Stuart J. Ishimaru, said, "All sexual harassment in unacceptable, but what happened here is unspeakable. This shows how dangerous a situation can become when employers are hostile to workers' rights and sexual harassment goes unchecked. There is simply no excuse for any employer tolerating this sort of worker abuse, and enough is enough. The EEOC is going to be focusing more and more on finding new and better ways to reach the most vulnerable of discrimination victims like these farm workers, and to halt this kind of horrific mistreatment." ♦

EEOC Sues Wal-Mart

In May, the U.S. Equal Employment Opportunity Commission filed a lawsuit against Wal-Mart. According to the lawsuit, a Sam's Club in Fresno, California subjected Latino employees to repeated verbal harassment, including the repeated use of derogatory words such as "wetback." Discrimination in employment on the basis of national origin and/or race is a violation of Title VII of the U.S. Civil Rights Act of 1964 and also of the Bloomington Human Rights Ordinance.

According to the EEOC's press release, it first tried to reach a voluntary settlement with Wal-Mart. When that failed, it filed the lawsuit and is seeking compensatory and punitive damages for each of the claimants as well as injunctive relief, including the creation of a formal discrimination complaint procedure, effective investigative and monitoring mechanisms and annual training on equal employment opportunity to all employees.

The local director of the Fresno EEOC, Melissa Barrios, said, "It is appalling that an employer, after becoming aware of the harassment, allowed this type of behavior to continue without taking appropriate and corrective action. The EEOC will continue to expand its presence in the Central Valley to ensure that its employers understand the magnitude of their duty to protect employees from discrimination."

Anna Park, an attorney with the EEOC's district office in Los Angeles, said, "The harassment started with one particular coworker, but ultimately this has to do with management's failure to stop the harassment. After it was reported to the managers, they didn't do anything about it and allowed it to continue."

A spokeswoman for Wal-Mart, Michelle Bradford, said that her company works to ensure employees are treated fairly. She said, "We work hard to make sure they feel respected and valued in the workplace." She declined further comment about the pending litigation. ♦

Racial Discrimination In Housing

Blatant racial discrimination in housing seems to be rare in Bloomington, but perhaps it's not so rare in Minnesota. Housing and Urban Development recently filed a lawsuit in federal district court that, if proved, shows that housing discrimination still exists.

According to the complaint, an African American woman in Detroit Lakes, Minnesota, Ranesha Haliburton, called a landlady, Pearl Beck, about renting a duplex. They discussed Ms. Haliburton's employment. Ms. Beck said she was willing to accept Section 8 as long as Ms. Haliburton was a "good clean tenant." When asked later if she knew Ms. Haliburton was African American when she talked to her on the phone, Ms. Beck said, "No. No way. No."

Ms. Haliburton went to look at the unit with her boyfriend and her boyfriend's father, both African American. Ms. Beck's husband, Gregory Beck, unlocked the unit for them. But Ms. Beck stayed in their car and told Mr. Beck and the prospective tenants, "No way. No way, it's not for rent. I can't do this. I'm not renting to these people." Mr. Beck then got back into the car and he and his wife left the property.

Ms. Haliburton asked a white friend to call the Becks to inquire about the unit. Ms. Beck showed the white friend the unit, which was still available. The white friend, claiming concern for her son, asked Ms. Beck if she rented to "blacks" or "natives." Ms. Beck told her, "A car load come by the other day, but I will keep the unit vacant, or move in myself, before renting to blacks."

Ms. Haliburton then talked to a white attorney, who also called Ms. Beck to inquire about the unit. Ms. Beck told the attorney that if she rented to black people, the next door neighbors would move out, and she didn't want to lose them as tenants. Later, Ms. Beck, apparently having caught on that her actions were questionable, called the law firm back and talked to a paralegal. She told the paralegal that she is not prejudiced, but she couldn't rent to a black family without losing her current tenants. (Customer preference is not a legitimate defense in a fair housing complaint.) She said that her son is married to a "very nice Indian." She said she didn't want a lawsuit. She offered to show the unit to Ms. Haliburton, even though it was already rented. The attorney talked to Ms. Haliburton, who had decided she would not be comfortable living in this unit, so she did not look at it. Instead, she, with HUD's help, filed a lawsuit. The lawsuit alleges that Ms. Haliburton has suffered significant damages, including out of pocket expenses, emotional and physical damages, economic losses, inconvenience and humiliation. ♦

Indiana Passes Stronger Service Animal Law

Indiana law has long required public accommodations to allow guide dogs. That law was amended in 2009 to require public accommodations and places of employment to allow service animals, not just guide dogs. The law says that service animals are animals especially trained as hearing animals, guide animals, assistance animals, seizure alert animals, mobility animals, psychiatric service animals or autism service animals.

The law defines a "public accommodation" as an establishment that caters or offers services, facilities or goods to the general public, including educational facilities such as nursery schools, elementary schools, secondary schools, undergraduate or post-graduate public or private institutions.

A person who refuses access to a public accommodation to someone because she has a service animal commits a Class C infraction. People with disabilities who have service animals, and people who are training animals to be service animals, are both protected by this law. Under the amendments, employers must allow employees with disabilities to keep their service animals with them at all times.

The law does not describe what kind of training is required for an animal to qualify as a service animal. ♦

CCA Seeks Award Nominations

The City of Bloomington Council for Community Accessibility will honor individuals, businesses and organizations that have gone above and beyond the call of duty on behalf of people with disabilities during its annual awards ceremony in October. The CCA is seeking nominations in the following categories:

- Kristin Willison Volunteer Service Award
- Business Service Award
- Professional and Community Service Award
- Housing Service Award
- Self Advocacy Award
- Mayor's Award

If you would like to nominate an individual, business or organization, please complete a nomination form, which can be done on-line by going to http://bloomington.in.gov/cfrd. The deadline for nominations is October 2, 2009. ♦

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PO Box 100
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